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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE PROFESSIONAL PHOTOGRAPHERS OF AMERICA, INC. IN SUPPORT OF RESPONDENT

The Professional Photographers of America, Inc. submits this brief *amicus curiae* in support of respondent. The parties to this action have given their written consent to the filing of this brief pursuant to Rule 36 of the Rules of this Court. The letters of consent have been filed with the clerk.

INTEREST OF THE *AMICUS CURIAE*

The Professional Photographers of America, Inc. ("PPA") is the largest professional society in the United States promoting the interests of professional photographers. PPA represents approximately 18,000 members, most of whom depend for their livelihood on copyright protection for their works.

Professional photographers commonly create portraits and other photographs on commission or order for members of the public. Such works are created outside of traditional employment relationships. Independent photographers and photographic studios rely on the revenue from reprints and other exploitation of the copyrights in their works to recover their expenses and earn any profit. Their creative incentive is dependent on their recognition as copyright owners.

As will be discussed below, the legislative history demonstrates that photographers' interests were specifically considered and vindicated by Congress in the provisions of the 1976 Copyright Act (the "1976 Act")[1] at issue in this case. The Second Supplementary Report of the Register of Copyrights on copyright revision specifically acknowledged that "[a]rtists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as "employees" under the carefully-negotiated definition [of works made for hire]."[2] Thus, photographers have a recognized interest in the proper interpretation of the work for hire doctrine.

Despite the clear history and language of the 1976 Act, professional photographers have found it necessary to defend their rights in litigation against photofinishers who unlawfully duplicate copyrighted portraits. PPA currently is participating in four such lawsuits involving the issues of work for hire and joint authorship.

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[1] Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (1982 & 1986 Supp. IV).

[2] Copyright Office, *Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, October—December 1975*, ch. XI at 12-13 (Draft ed. 1975) [hereinafter "Second Supplementary Report"].

The Court of Appeals in this case correctly interpreted the work for hire[3] provisions of the 1976 Act. The interpretation advocated by petitioners would destroy the carefully negotiated compromise adopted by Congress and could cloud the clear protection Congress provided to professional photographers.

Moreover, petitioners, certain *amici*, and the Court of Appeals have discussed the relationship of the doctrine of joint works to the work for hire issue. Proper interpretation and integration of this doctrine with that of work for hire is essential to the protection Congress afforded photographers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the 1976 Copyright Act, and consistent with the Constitutional mandate "To promote the Progress of Science and useful Arts,"[4] the person who creates an artistic work is the author and original copyright owner except in certain specific cases. As the Register of Copyrights explained in the Second Supplementary Report on copyright revision, "the individual author is the fountainhead of copyright protection."[5] Under one exception to this general principle, "the employer or other person for whom the work was prepared is considered the author" in the case of a "work made for hire." 17 U.S.C. § 201(b) (1982). Work made for hire is defined in the Act as "(1) a work prepared by an employee within the scope of his or her employment;" or (2) certain specifically enumerated "specially ordered or commissioned" works under certain circumstances. *Id.* § 101.

The work for hire provision of the Copyright Act emerged as a carefully balanced and nuanced compromise

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[3] We adopt the almost universal convention of using "work for hire" in place of the longer statutory term "work made for hire."

[4] U.S. Const. art. I, § 8, cl. 8.

[5] Second Supplementary Report, ch. XI at 9.

following a contested legislative history. That history demonstrates beyond cavil that the Congress and the Copyright Office, which served as Congress' draftsperson and mediator, intended a clear distinction between works created by employees acting within the scope of their employment (governed by clause 1) and works created by independent contractors on commission or special order (governed by clause 2).

By its language—"employee within the scope of his or her employment"—the 1976 Act invokes well settled principles of agency law. In ordinary usage, "employee" and "independent contractor" are mutually exclusive concepts of agency law. Moreover, the phrase "scope of employment" is a recognized term of art in agency. The ordinary meaning of the statutory language should govern.

Congress intended to limit application of clause 1 to salaried or other regular employees within the meaning of agency law. The legislative history reveals that all parties to the work for hire compromise adopted by Congress understood that

(i) "employee" means salaried or other regular agency-law employee

(ii) independent contractors creating "specially ordered or commissioned" works are not "employees" within the statutory definition, and

(iii) works created by independent contractors are governed exclusively under the rubric of works created on "special order or commission."

The key to understanding the legislative history is the timing of the work for hire debate that yielded the compromise. Work on copyright law revision began in 1955. The work for hire compromise was reached in 1965. That compromise was, with only minor changes, incorporated into the final 1976 Act.

Petitioners contend that Congress could not have intended to overturn what they claim to have been the "existing judicial approach" without so declaring. However, at the time the compromise was crafted in 1965, the existing law was generally, upon the Copyright Office's own analysis, that the work for hire doctrine applied only to salaried or other regular agency-law employees. The first case to extend the work for hire doctrine generally to include works of independent contractors was decided in 1966, the year after the terms of the work for hire compromise were in place.

The legislative history provides no support for the proposition that Congress intended to replace the delicate, long debated, and well-understood 1965 compromise with judicial interpretation of the 1909 Act after 1965. To the contrary, Congress explicitly adopted the 1965 compromise, as the Register of Copyrights publicly confirmed immediately prior to and shortly after adoption of the 1976 Act.

The interpretation of work for hire adopted by the Court of Appeals best achieves and serves the policies of the Act. It secures the protection of individual authors who are most in need of the protections and incentives afforded by copyright. Because independent authors may assign their copyright, the interests of commissioning parties are also protected.

Moreover, as the Court of Appeals correctly noted, the interpretation of work for hire advocated by petitioners would create substantial uncertainty with respect to copyright ownership of independent contractor works, requiring work-by-work evidentiary evaluation of the supervision and control exercised by the commissioning party, and application of an indeterminate, ill-defined standard.

Accordingly, the decision of the Court of Appeals should be affirmed.

In order to ensure that the protection afforded to independent individual authors under the work for hire doctrine is not circumvented, the doctrine of joint authorship must be appropriately defined and integrated. Courts have heretofore rebuffed efforts to expand the concept of joint authorship for that purpose. This Court should make clear that absent a substantial, copyrightable contribution, a commissioning party is not a joint author of a commissioned work.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT INDEPENDENT CONTRACTORS UNDER AGENCY LAW ARE NOT EMPLOYEES WITHIN THE MEANING OF THE COPYRIGHT ACT.

After carefully reviewing the language, legislative history, and judicial and scholarly interpretations of the work for hire doctrine, the Court of Appeals held that "a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work [meets the specific requirements of clause 2 of the definition]."[6] In reaching its conclusion, the Court of Appeals followed the thorough decision of the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults v. Playboy Enterprises.*[7] In light of the ordinary meaning of the statutory language, its legislative history, and the policy of the work for hire doctrine, no other interpretation is supportable.

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[6] *Community for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1494 (D.C. Cir. 1988).

[7] 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988). On January 13, 1989, the Ninth Circuit, after an in-depth review of the legislative history, aligned itself with the Fifth and D.C. Circuits, holding that clause 1 of the work for hire definition applies only to "formal, salaried employees." *Dumas v. Gommerman*, No. 87-6542, slip op. at 26 (9th Cir. Jan. 13, 1989) (LEXIS, Genfed library, USApp file).

A. The Ordinary Meaning of the Work For Hire Doctrine Distinguishes between Employee and Independent Contractor Works.

As petitioners have recognized, "[i]n construing the 1976 Act, 'it is appropriate to assume that the ordinary meaning of the language that Congress employed "accurately expresses the legislative purpose."'" Petitioners' Br. at 17 (quoting *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985)). This assumption is particularly appropriate because the definition of "work for hire" was the result of a carefully negotiated legislative "compromise."[8] *See, e.g., United States v. Sisson*, 399 U.S. 267, 291, 298 (1970) ("compromise origins" of an act "justify the principle of strict construction"); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 617 (1981) (In interpreting the intent of Congress in fashioning a legislative compromise, "the wisest course is to adhere closely to what Congress has written.").

The "ordinary meaning" of the definition of "works for hire" is the meaning adopted by the Court of Appeals in this case and by the Fifth Circuit in *Easter Seal Society*. The definition divides works for hire into two classes—(i) works "prepared by an employee within the scope of his or her employment" and (ii) works "spe-

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[8] *See Dumas*, slip op. at 15-17, 22-23; *Copyright Law Revision*, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976) ("The work-made-for-hire provisions of this bill represent a carefully balanced compromise . . . . The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered works made for hire under certain circumstances."); H.R. Rep. No. 83, 90th Cong., 1st Sess. 87 (1967) ("After full consideration the committee decided to incorporate the substance and much of the language of this compromise in the bill."); Second Supplementary Report, ch. XI at 7 ("After a great deal of discussion and splitting of hairs, the definition of a 'work made for hire' which emerged in the bill . . . represented a carefully balanced compromise . . . .").

cially ordered or commissioned" under certain well defined conditions. 17 U.S.C. § 101.

In ordinary usage, an employee is "one employed by another usu[ally] for wages or salary and in a position below the executive level."[9] Regardless of whether the word "employee" is considered to have "definite content" (Petitioners' Br. at 17), in ordinary usage, "'employee' must be distinguished from 'independent contractor.'"[10] "Employee" and "independent contractor" are generally regarded to be mutually exclusive concepts governed by traditional agency law standards.[11]

Moreover, the phrase "scope of employment" is a widely used term of art in agency law.

> The word "employment" means the subject matter as to which the master and servant relationship exists. The phrase "scope of employment" means the extent of this subject matter and denotes the field of action within which one is a servant.

Restatement (Second) of Agency, § 228 comment a (1958); *see Easter Seal Society*, 815 F.2d at 335

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[9] Webster's Ninth New Collegiate Dictionary 408 (1983).

[10] Black's Law Dictionary 471 (5th ed. 1979) (further defining "employee" as "one who works for an employer; a person working for salary or wages").

[11] *See, e.g., Vane v. Newcombe*, 132 U.S. 220, 233-34 (1889) ("It seems clear to us that Vane was a contractor with the company, and not an employe within the meaning of the statute."); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520-21 (1926) ("Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors."); *Campbell v. Commisioner*, 87 F.2d 128, 130-31 (7th Cir. 1936) ("The question of whether or not a person is an employee of government or is an independent contractor has been before this and other courts many times."), *cert. denied*, 301 U.S. 688 (1937).

("'Scope of employment' is virtually a term of art in agency law").[12]

In short, by limiting clause 1 of the work for hire doctrine to employees acting within the scope of their employment, the 1976 Act invokes well settled, familiar principles of agency law.

B. The Legislative History of the Work For Hire Compromise Demonstrates a Clear Understanding that Independent Contractors Under Agency Law Were Not "Employees" Within the Meaning of the First Clause of the Definition.

The timing of the compromise that gave rise to the definition of works for hire in the 1976 Act is critical to understanding its legislative history. As this Court described in *Mills Music*, 469 U.S. at 159-61, the legislative process leading to the 1976 Act began in 1955 with the appropriation by Congress of funds for the Copyright Office to conduct a comprehensive series of thirty-four studies on major issues of copyright law. Study number thirteen of the series, completed by Borge Varmer in April 1958, focussed on "Works Made for Hire and on Commission."[13]

As petitioners have recognized (Br. at 28), "[t]he commissioned works controversy was effectively resolved in 1965 when eight interested groups representing book publishers, music publishers and artists entered into a compromise agreement covering a range of copyright

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[12] By cojoining the concepts of "employee" and "scope of employment," the language draws an obvious parallel to the doctrine of *respondeat superior*. *Cf. American Fed'n of Unions v. Equitable Life Assurance Soc'y.*, 841 F.2d 658, 665 (5th Cir. 1988) (*respondeat superior* applies to acts of "employee . . . in the course and scope of his employment"). This parallel was intended. *See* pages 13-14, *infra*.

[13] B. Varmer, *Works Made for Hire and on Commission*, Copyright Office Study No. 13, 86th Cong., 2d Sess. 123 (Comm. Print 1960) [hereinafter "Varmer Study"].

issues." *See Dumas*, slip op. at 15. Thus, the most relevant period for determining the content of the work for hire compromise is the period from 1958, when the Varmer Report was issued, through 1965. Later developments are useful principally for the light they shed on this earlier period.

The central thesis of petitioners' argument fails in the face of this timing. Petitioners contend that Congress could not have intended a radical departure from existing law without acknowledging the change: "[T]here is no indication whatsoever in the legislative history of the 1976 Act that Congress ever considered replacing the existing judicial approach with one that focussed exclusively upon agency law." *E.g.*, Petitioners' Br. at 16.[14]

However, as the legislative history demonstrates, between 1958 and 1965, the existing law was, generally, that "employee" within the meaning of work for hire referred to salaried or other regular agency law employees. It was not until 1966, in *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966), that a court, interpreting the 1909 Copyright Act,[15] first held that commissioned works should generally be treated as works for hire.[16]

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[14] *Id.* at 14-15 ("[T]here is absolutely nothing in the 1976 Act or its legislative history which evidences any Congressional intent to repudiate [the allegedly consistently applied supervision and control] standard."); *see id.* at 20.

[15] Copyright Act of 1909, 17 U.S.C. § 1 *et seq.* (1970).

[16] *See Easter Seal Society*, 815 F.2d at 326; Petitioners' Br. at 29. As petitioners recognize (Br. at 29), prior to 1966, a line of cases had imposed a presumption that an independent contractor had assigned his copyright to the commissioning party. *See, e.g., Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940). These cases, however, did not rely on the work for hire doctrine. *See Dumas*, slip op. at 7 n.4. It is, therefore, not surprising that they did not form the basis of the Register's and Congress' consideration of work for hire.

In short, the cases interpreting the 1909 Copyright Act, on which petitioners rely, actually were decided *after* the primary terms of the work for hire doctrine under the 1976 Act were settled in the legislative process. There is no indication anywhere in the legislative history of the 1976 Act that Congress intended to overturn the delicate and well-understood 1965 compromise in favor of the interpretation first adopted by the Second Circuit in 1966. To the contrary, as discussed below, Congress explicitly adopted the 1965 compromise in the 1976 Act.

In *Mills Music*, this Court described the legislative process that followed the issuance of the commissioned Copyright Office studies. In July, 1961, the Register of Copyrights issued a report containing recommendations for copyright revision.[17] Following numerous meetings with representatives of the various affected interests, the Register issued draft revision bills in 1963 and 1964 and received comments from interested parties. The Register then issued a Supplementary Report in 1965.[18] *See generally, Mills Music*, 469 U.S. at 159-61. Ten years later, as part of the hearings leading to final passage of the 1976 Act, the Register prepared a Second Supplementary Report, reviewing and explaining prior developments.[19]

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[17] *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. (Comm. Print 1961) [hereinafter "Register's 1961 Report"]; *see Mills Music*, 469 U.S. at 159.

[18] *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 89th Cong., 1st Sess. (Comm. Print 1965) [hereinafter "Register's Supplementary Report"].

[19] Second Supplementary Report.

As a review of this history demonstrates, from the beginning of the copyright revision process until the 1965 compromise was reached, all parties[20] recognized that:

- "employees" meant salaried or other regular agency law employees;
- independent contractors were not "employees" within the definition of works for hire; and
- works created by independent contractors were discussed and considered exclusively under the rubric of works created on "special order or commission."

1. *The 1958 Varmer Study*

The propositions stated above appear unambiguously in the 1958 Varmer study, which formed the basis for later discussion of the work for hire issue. At the outset of the Study, Varmer identified three distinct ways a magazine publisher could obtain an article:

> (1) He may assign the task of writing the article to a *salaried* employee;
>
> (2) He may *commission* an author to write the article for a fixed fee;
>
> (3) He may acquire [by assignment or license] the article from an author who has written it on his own initiative.

Varmer Study, Committee Print at 127 (emphasis added).

[20] "[W]e quite properly are concerned with what the private interest groups, the negotiators, thought the terms meant when they negotiated and agreed to them. Congress's intent clearly was to embody in the Act the negotiated compromises. We must be careful not to distort the bargain reached after so many years of negotiation and compromise." *Dumas*, slip op. at 17 (discussing the work for hire compromise); *see Mills Music*, 469 U.S. at 182 n.6 (White, J., dissenting) (where legislation is the result of compromise, statements by interested parties carry some weight). Moreover, the understanding of the Copyright Office regarding work for hire was in accord with that of the parties. *See* pages 12-15, 17-20, *infra*.

Varmer then described the existing case law interpreting the work for hire doctrine under the 1909 Copyright Act. The Study noted that "*all the cases have involved salaried employees who received either a fixed salary or a minimum salary plus commission*," *id.* at 130 (emphasis added), and that in one case, a court "held that a work made by an employee as an extra assignment for extra pay was not a work made for hire." *Id.*[21] Accordingly the Study stated that "*it may be concluded that section 26 [of 1909 Act dealing with works for hire] refers only to works made by salaried employees in the regular course of their employment.*" *Id.* (emphasis added).[22]

The Varmer Study then considered and *rejected* arguments similar to those being made by petitioners and their supporting *amici* in this case. Basing its analysis on the common law distinction of employees and independent contractors, the Varmer Study concluded that independent contractors should not fall within the scope of the work for hire doctrine:

> It might be argued that the policy considerations regarding the ownership of copyright in commissioned works are in many ways similar to those with respect to works made in the course of employment. Both classes of works are produced for, pursuant to the initiative and order of, and against payment by, a person other than the creator. The differences in

[21] Citing *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F.2d 569 (2d Cir.), *modified on other grounds*, 223 F.2d 252 (2d Cir. 1955).

[22] Varmer subsequently identified a single class of commissioned (independent contractor) works for which courts had held the work to have been made for hire—portrait photographs and paintings. *Id.* at 130. Varmer considered these cases to create a special rule for portraits that Congress "might undertake to codify." *Id.* at 143. As will be discussed below, *see* pages 19-20, *infra*, Congress considered and rejected codification of such a rule on the ground that photographers and artists deserved greater protection.

type of payment or regularity of working hours between the employment and commission situations would not seem to be crucial reasons for different treatment.

> *However, the common law generally has differentiated between the employer-employee relationship and that of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission.*

Id. at 142 (emphasis added).[23] Moreover, the Varmer Study made clear that the 1909 Copyright Act did not extend work for hire treatment to the works of independent contractors: "Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally." *Id.*[24]

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[23] Varmer explained that the underlying basis for the *common law agency* distinction between employees and contractors was the premise that an employer "*generally* gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor." *Id.* at 142 (emphasis added). Petitioners' misplaced reliance on the Varmer Report appears to stem from their failure to recognize that, considered in context, Varmer was not proposing a case-by-case definition of "employee" any different from that created by the common law of agency. Rather, Varmer was explicitly rejecting the argument that works produced by independent contractors, as they were classified under well-established common law agency concepts, should be considered works for hire.

[24] The Varmer study thus authoritatively contradicts petitioners' argument (*e.g.*, Br. at 15, 18) that the work for hire doctrine under the 1909 Copyright Act had been consistently interpreted to encompass agency-law independent contractors who had been supervised and controlled.

2. *The Register's 1961 Report.*

The Register's 1961 Report adopted Varmer's dichotomy between works by employees and works made on commission, and agreed with the Varmer Study that the work for hire doctrine did not include works made on commission. "The phrase used in the present [1909] statute—'works made for hire'—has been criticized as being inexact, because it might be thought to include works made on special commission. *The courts, however, have not generally regarded commissioned works as 'made for hire.'*" Register's 1961 Report at 86 (emphasis added). To further clarify the doctrine, the Register's Report recommended refining the definition of works for hire to include only "works created by an employee within the regular scope of his employment." [25]

3. *The 1963 Draft Bill and Comments.*

In the 1963 Preliminary Draft Bill (the "1963 Draft"), the Register maintained the clear dichotomy between works created by employees and works created by independent contractors. The 1963 Draft defined works made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." [26]

The reaction by publishers to the 1963 Draft highlights the broad understanding that, by excluding works

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[25] *Id.* at 87. A noted commentator has argued that the intent to limit works for hire "to those created in the 'regular scope of employment,' *i.e.*, by salaried employees, could not be clearer." W. Patry, *Latman's The Copyright Law* 119 (6th ed. 1986) [hereinafter "Patry"]. Patry argues that no significance should be attached to the omission of the word "regular" from subsequent revision bills. *Id.* at 119 n.26.

[26] Copyright Office, *Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft*, § 14 at 15 n.11 (Published as Copyright Law Revision, Part 3, September 1964). The published comments on the 1963 Draft will be cited herein as "1963 Draft Comments."

made on special order or commission, the Register intended to exclude all works by independent contractors:

> • If there were any such definition [in the book publishing industry], you'd put a whole industry out of business—namely, the freelancers . . . . There would be a necessity of putting people on the payroll whom the employers wouldn't want to put on the payroll, and where the employees would prefer to work as independent contractors.[27]
>
> • In other words, a motion picture company would employ a man, and give him three months to write a script. That would be a work made on special order or commission, and therefore it would not be for hire.[28]

The written comments of the American Book Publishers Council on the 1963 Draft were even more explicit, objecting to the Draft because, under the proposal, works for hire "include only work done by a salaried employee in the scope of his regular duties, and would exclude works made on special order or commission."[29] Nowhere in the legislative history did the Copyright Office, the interested parties, or Congress advise the publishing community that their understanding of "employee," as used in the 1963 Draft, was mistaken. To the contrary, "plenty of discussion indicates that everyone involved understood the term [employee] to mean

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[27] 1963 Draft Comments at 259 (Comments of Horace S. Manges, representing the Joint Committee of the American Book Publishers Council and the American Textbook Publishers Institute).

[28] *Id.* at 258-259 (Comments of Julian T. Abeles, representing the Music Publishers' Protective Association, Inc.).

[29] *Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law*, 88th Cong., 2nd Sess. 250 (Comm. Print 1964).

someone working for an employer in a salaried job, and understood the term to exclude freelance workers completely." *Dumas*, slip op. at 15 (quoting Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857, 901 (1987)).

4. *The 1964 Draft Bill and Comments.*

In response to these concerns of the publishing community, the Copyright Office reversed course, proposing in the 1964 Draft Revision Bill (the "1964 Draft") that a "work made for hire" be "a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."[30] In short, under the 1964 Draft, all commissioned works could be treated as works for hire if agreed in writing. Had the Copyright Office believed the publishing community was misconstruing the phrase "employee within the scope of his employment," it would, almost certainly, have made this point prior to or in conjunction with this change in position. The Office's silence on the construction of "employee," in the face of comments that prompted an expansion of the eligibility of non-employee works to be works for hire, is strong evidence that the Office believed the publishers' comments correctly stated the scope of "employee" works.

Nor is there any evidence that the 1964 Draft intended to alter the meaning of "employee within the scope of his employment." The 1964 Draft retained the clear distinction between employee works and works prepared on

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[30] *1964 Revision Bill with Discussion and Comments*, 89th Cong., 1st Sess. 31, § 54 (Comm. Print 1965) [hereinafter "1964 Draft Bill", or "1964 Draft Comments", as applicable]. *See id.* at 144-45 for the motivation behind the change.

special order or commission that formed the basis of the earlier proposals.

The approach of the 1964 Draft Bill "drew even heavier fire [than the 1963 Draft Bill] from the representatives of authors' organizations, who argued that an author could easily be induced to sign a form contract stating that his work is 'made for hire.'" Register's Supplementary Report at 67.

5. *The 1965 Compromise.*

In April, 1965, the two sides reached a compromise that bears a close resemblance to the provision finally enacted in 1976.[31] The compromise language continued unchanged the definition of works for hire as "a work prepared by an employee within the scope of his employment." The essence of the compromise was limitation to specifically enumerated kinds of ordered or commissioned works that could, by written agreement, be converted into works for hire. *See* Register's Supplementary Report at 67. As the Register explained, "[o]ther works made on special order or commission would not come within the definition." *Id.* at 67-68. In short, within the class of works created by independent contractors, only those specifically enumerated could be considered works for hire; no others could be. *See Dumas*, slip op. at 23-24.

6. *Later Exposition of the Compromise.*

After further negotiations, the specifically enumerated class of independent contractor works included in clause 2, and thus made eligible for work for hire status, was expanded somewhat. *See* Patry at 121-22. However, the

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[31] *Dumas*, slip op. at 15, 22-24; *see* Patry at 120-21 (citing *Copyright Law Revision: Hearings on H.R. 4347 et al. Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 89th Cong., 1st Sess. 134, 148-49 (1965)).

fundamental distinction between works created by employees within the scope of their employment and works created by independent contractors on commission was retained in all subsequent versions of the bill.[32] Congress explicitly incorporated the compromise into the 1976 Act. *See* note 8, *supra*.

Nothing in the legislative history suggests that Congress intended to alter the fundamental terms of the 1965 compromise in light of subsequent judicial decisions under the 1909 Act. Indeed, subsequent developments, both immediately preceding and following passage of the 1976 Act, confirmed the limited scope of work for hire enacted in 1976.

An attempt to expand the class of commissioned works subject to a work for hire agreement to include portrait photographs and paintings[33]—and, thus, to continue an anomaly in pre-1965 judicial precedent with respect to such works[34]—was *rejected* on the recommendation of the Register of Copyrights. As the Second Supplementary Report explained in 1975:

> The addition of portraits to the list of commissioned works that can be made into "works made for hire" by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not

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[32] "The subcommittee [in 1965] produced a chapter on copyright ownership and transfer together with a definitive legislative report that have remained unchanged and virtually unchallenged for nearly 10 years . . . ." *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 94th Cong., 1st Sess. 1889 (1975) (Testimony of B. Ringer, Register of Copyrights).

[33] *See Copyright Law Revision*, S. Rep. No. 460, 94th Cong., 1st Sess. 4 (1975).

[34] *See* note 22, *supra*.

intended to be treated as "employees" under the carefully-negotiated definition in section 101.

Second Supplementary Report, ch. XI at 12-13. No suggestion was made that portrait photographers or artists might fall within the first clause of the definition. The Register's clear intent was that the works of portrait photographers and portrait artists would not be works for hire.[35]

In 1979 Barbara Ringer, then Register of Copyrights, testified before Congress concerning certain provisions of the 1976 Act which had taken effect the previous year. The Register stated that:

> [e]ver since enactment of the new law, the Copyright Office has been receiving complaints about the policies adopted by certain publishers and producers in their dealings with *independent* authors, artists and photographers. Under the definition of "works made for hire" a person preparing a work on special order or commission can be considered an "employee for hire" *only* if the work falls into certain categories, and then only if the parties expressly agree in writing that the work shall be considered a "work made for hire". *This provision, like others in the new statute, was intended to give authors and artists greater protection than they had enjoyed under previous laws.*[36]

In short, throughout the legislative history, it was understood by the interested parties, by the Copyright Office, and by Congress, which adopted the compromise

[35] Thus, the only class of independent contractor work that had been included within the work for hire doctrine at the time of the Varmer Study, *see* note 22, *supra*, was expressly excluded under the 1976 Act.

[36] *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm.*, 96th Cong., 1st Sess. 24 (1979) (emphasis added) [hereinafter "1979 Hearings"].

agreement, that independent authors, artists and photographers were covered exclusively by clause 2 of the definition of work for hire. Clause 1 applies to salaried or other regular agency law employees acting in the scope of their employment.

C. The Use of Agency Law Standards To Differentiate Salaried or Other Regular Employees from Independent Contractors is Mandated by Copyright Policy.

As the Register explained in her Second Supplementary Report to Congress shortly before final consideration and passage of the 1976 Act, the basic principle of U.S. copyright law is "that the individual author is the fountainhead of copyright protection." Second Supplementary Report, ch. XI at 9. More than any other class of authors, the individual author most needs the protections afforded by the Copyright Act and the incentives for creativity that form the basis for the Constitutional scheme of copyright. The work for hire doctrine embodied in the 1976 Act reflected these principles and "was intended to give authors and artists greater protection than they had enjoyed under previous laws."[37]

Petitioners now seek to rewrite the Copyright Act to strip a key subclass of individual, independent authors and artists of the protection intended and afforded by the revisions to the work for hire doctrine. In so doing, they threaten to damp the incentives intended by Congress and the Constitution. The interpretation of work for hire advanced by petitioners before this Court is contrary to the 1976 Copyright Act and core principles of copyright law.

Moreover, as the Court of Appeals in this case and the Fifth Circuit in *Easter Seal Society* correctly observed, *see* 846 F.2d at 1494; 815 F.2d at 333-34, the approach

[37] 1979 Hearings at 24.

urged by petitioners would create substantial uncertainty with respect to copyright ownership of independent contractor works. *See also Dumas*, slip op. at 30. Petitioners' approach leaves determination of the copyright status of independent contractor works to an after-the-fact judicial analysis of whether the commissioning party *actually exercised* sufficient supervision and control over the independent contractor in the performance of his commission. This analysis would require consideration of the facts and circumstances on a work-by-work basis, since the degree of supervision and control actually exercised by the commissioning party will inevitably vary from work to work.[38]

Moreover, no clear standard exists to guide the determination of how much supervision and control is enough. Petitioners urge, in effect, the creation of a new juridical class of "employee," an employee within the meaning of the Copyright Act and peculiar to it.

Contrary to Petitioners' repeated assertions, the "actual supervision and control" test advanced by petitioners was not "applied consistently by the courts under the 1909 Copyright Act." Petitioners' Br. at 15; *see id.* at 18, 20. Indeed, it was not the standard under the 1909 Act. As previously discussed, prior to 1966, it was generally concluded that the work for hire doctrine invoked well-known agency law principles in identifying "employees" for hire. Between *Brattleboro* in 1966 and the effective date of the 1976 Act, courts following *Brattleboro* required only that the work be done at the instance and expense of the commissioning party and that the commissioning party retain only the *right* to supervise

[38] *See Dumas*, slip op. at 30-31. ("*Aldon* permits the outcome of copyright disputes to vary even between the same buyer and same seller in a series of works produced together . . . . In a case such as this, for example, application of the supervision and control test could lead to different results for each of the lithographs [at issue].").

and control the independent contractor, thereby effectively eliminating the distinction between employee works and commissioned works.[39] The standard advocated by petitioners was an original creation of the Second Circuit in *Aldon Accessories Ltd. v. Spiegel, Inc.*,[40] in 1984.

Rather, as the Court of Appeals below and the Fifth Circuit in *Easter Seal Society* correctly observed, certainty in copyright transactions would be far better served by the use of traditional agency law principles in identifying employee works for hire. 846 F.2d at 1494;

[39] *See, e.g., Easter Seal Society*, 815 F.2d at 326 (citing *Brattleboro*, 369 F.2d at 565) (the court summarized a number of cases as "creating the rule that the employer is the 'author' 'whenever an employee's work is produced at the instance and expense of his employer.'"); *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978) ("The crucial element in this determination appears to be whether the work was created at the employer's insistence [sic; instance] and expense, or, in other words, whether the motivating factor in producing the work was the employer who induced its creation."); *cf. Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410, 412 (4th Cir. 1987) ("Before 1978, it mattered little, if at all, that the commissioner neither possessed nor exercised the right to direct the manner in which the work was done.").

[40] 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984); *see Dumas*, slip op. at 9 ("No circuit, in deciding copyright ownership under the 1976 Act, has continued to follow the employer-oriented approach of cases decided under the 1909 Act."). The novelty of the Second Circuit's standard itself demonstrates a fatal inconsistency in petitioners' position. Petitioners attempt to portray *Aldon Accessories* as merely carrying forward the law in existence as of the passage of the 1976 Act. Petitioners' Br. at 14-15, 20. Yet not even petitioners can argue that Congress, in passing the 1976 Act, intended to retain the "instance and expense" standard of *Brattleboro* and its progeny. *See id.* at 3-4 (urging adoption of the *Aldon Accessories* standard). As recognized by the Court of Appeals below and the Fifth Circuit in *Easter Seal Society*, continuation of the "instance and expense" standard could not have been intended, since it would effectively read out of existence the care-

815 F.2d at 335.[41] Agency law focusses on the relationship between the employer and employee, not on the employer's relationship to a particular work. Thus, the relationship can be settled prior to the creation of any particular work. Moreover, agency law uses well developed, generally understood standards. In short, it will be easier to apply and more easily understood.

Nor will the use of an agency law standard necessarily cause the copyright fractionalization feared by petitioners and certain amici. As discussed below, although the doctrine of joint works has been invoked in an attempt to circumvent the protections for individual authors embodied in the 1976 Act, proper interpretation of that doctrine, coupled with the use of written copyright assignments, will obviate concerns of fractionalization.

* * * *

In sum, the plain language, legislative history, and policies underlying the Copyright Act and the 1976 revision of the work for hire doctrine support the decision of the Court of Appeals in this case. That decision should be affirmed.

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fully negotiated clause 2 of the work for hire definition. *See* 846 F.2d at 1493-94; 815 F.2d at 331.

Once it is conceded that Congress did not intend to follow the "instance and expense" standard in the 1976 Act, it is far more logical to conclude that Congress' failure to mention *Brattleboro* demonstrates its intent to follow the understandings of the 1965 compromise than that it demonstrates an intent to create a novel, hybrid standard, peculiar to copyright law, for identifying "employees."

[41] Certainty would be even better served by limiting clause 1 to works of salaried or other regular employees. *Cf. Dumas*, slip op. at 35-37 (certainty best served by limiting "employee" to "formal, salaried employees").

II. PROPER INTERPRETATION OF THE JOINT WORK DOCTRINE IS ESSENTIAL TO PRESERVE THE PROTECTION AFFORDED INDEPENDENT CONTRACTORS BY CONGRESS.

Having concluded that the work at issue in this case was not a work made for hire, the Court of Appeals nevertheless concludes that CCNV may retain a copyright interest in the work as a joint author. 846 F.2d at 1497. A commissioned work may, in appropriate circumstances, be the joint work of the commissioning party and the independent contractor.[42] However, it is essential that the doctrine be properly interpreted lest the protection intended and afforded to independent contractors by the 1976 Act under the work for hire doctrine be circumvented.

Petitioners, in their effort to raise the specter of copyright "fractionalization," suggest that the authorship standard for joint works has been established and may be met by a very small contribution to the work—"the contribution [to a joint work] is not required to be copyrightable itself."[43] In fact, such a standard is neither established, nor consistent with law or common sense.

At minimum, joint authors must be *authors* within the meaning of the Copyright Act. *See* 17 U.S.C. § 101 ("A 'joint work' is a work prepared by two or more authors. . . ."). Further, extending authorship status to one who contributed only the idea of a work and not expression would run directly counter to the rule that copyright protects only expression and not ideas. *Id.* § 102(b). Thus, courts have regularly rejected joint authorship claims by commissioning parties who provided

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[42] PPA takes no position on whether, under the facts in this case, the work at issue is properly considered a joint work.

[43] Petitioners' Br. at 31 (citing 1 M. Nimmer, *Nimmer on Copyright*, § 6.07 at 6-18).

information necessary to define the scope of the project or who specified desired design features.[44]

The Ninth Circuit, commenting on the application of the joint authorship doctrine to commissioned works, recently stated that a commissioned work might be a joint work "where the commissioning party provides *significant creative input.*" *Dumas*, slip op. at 38 (emphasis added). And, as one commentator has stated, "a putative joint author must make some genuine contribution to the work's creation." Patry at 116.

The potential for abuse of the joint authorship doctrine is starkly demonstrated in several cases PPA is currently litigating against photofinishers who have been duplicating copyrighted portrait photographs without the photographers' authorization. Several photofinishers have argued that their conduct is not infringing on the ground that, in their view, the commissioning party or subject, who does little more than present him or herself for photographing, identifies other subjects of the picture, and, in certain cases, selects clothing and suggests a pose,

[44] *See, e.g., Whelan Assocs. Inc. v. Jaslow Dental Laboratory, Inc.*, 609 F. Supp. 1307, 1318 (E.D. Pa. 1985), *aff'd*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) (rejecting joint authorship claim relating to computer program by party who sought out programmer, defined task, described business and provided some assistance: "[t]he information and advice which Rand Jaslow provided was little more than one would expect from the operator of any business who seeks to have a computer system designed for him."); *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 259 (D. Neb. 1982) (rejecting building owner's claim of joint ownership in architectural plans: "[i]n this relationship, it is quite normal for the client to supply the engineer or architect with general design features which the client expects to be incorporated into architectural plans and for the professional then to create the design drawings incorporating those features."); *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981) (rejecting claim for joint authoriship of architectural plans by owner who provided initial "thumbnail" sketches, contributed ideas, defined needs, made changes and exercised approval power.).

is a joint author of the photograph, and therefore joint owner of the copyright with the photographer.[45] Were this contention upheld, it would vitiate the protection afforded portrait photographers by the 1976 Act. *See* pages 19-20, *supra*.

Moreover, it would skew the incentive structure intended by the Constitution and enacted by Congress. A subject does not require the protection of copyright to appear for a portrait. The photographer does require that protection to produce the portrait.

The only courts to rule on claims that a portrait subject is a joint author have rejected this joint authorship claim.[46] However, the mere fact that it is being raised, demonstrates that the doctrine must be properly interpreted and integrated with the language, purpose and policy of the statutory provisions governing work for hire.

In order to be a joint author, a commissioning party must make a substantial creative contribution to the work. This contribution must be of a kind that itself is entitled to copyright protection.

[45] *See, e.g., Olan Mills, Inc. v. Eckerd Drugs of Texas, Inc.*, No. 3-88-0333-D (N.D. Tex. 1988), *reported in* Pat. Trademark & Copyright J. (BNA), Vol. 37 at 246 (Jan. 12, 1989); *Professional Photographers of Am., Inc. v. 1240 Camera Co.*, No. 3-88-2739-D (N.D. Tex. 1988).

[46] *See Olan Mills, Inc. v. Eckerd Drugs of Texas, Inc.*, No. 3-88-0333-D (N.D. Tex. 1988) (memorandum opinion accompanying order granting preliminary injunction) (in which PPA is a party plaintiff), *reported in* Pat. Trademark & Copyright J. (BNA), Vol. 37 at 246 (Jan. 12, 1989); *Childers v. High Society Magazine*, 561 F. Supp. 1374, 1375 n.2 (S.D.N.Y. 1983).

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed. In order to prevent the circumvention of the work for hire doctrine, this Court should make clear that a substantial, copyrightable contribution is necessary for a commissioning party to be a joint author of a work produced by an independent contractor.

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